

No. 46229-0-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

BENJAMIN A. PETERS, APPELLANT

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Appeal from the Superior Court of Mason County  
The Honorable Toni A. Sheldon

No. 14-1-00013-8

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**BRIEF OF RESPONDENT**

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A. STATE'S COUNTER-STATEMENT OF ISSUE PERTAINING  
TO APPELLANT'S ASSIGNMENTS OF ERROR

The State charged Peters in a two-count complaint with robbery in the second degree and with escape from community custody. Prior to trial, Peters' trial counsel said that the two charges should be severed for trial, but the court did not rule on the issue, and Peters' trial counsel did not renew the motion. *Was Peters' trial counsel ineffective for failing to renew the motion where the decision to forego the severance motion was a legitimate trial strategy and where Peters suffered no prejudice from his counsel's failure to renew the motion?*

B. FACTS AND STATEMENT OF THE CASE

In January of 2014, the Appellant, Benjamin Peters, was under the supervision of the Washington Department of Corrections (DOC) because of a prior felony conviction. RP 91. Peters was on the caseload of Community Corrections Officer (CCO) Russell Donovan, and Peters was required to report to Officer Donovan at the DOC office in Mason County on January 6, 2014. Peters reported as required, but CCO Donovan was absent that day; so, another officer, CCO Corbett, instructed Peters to report the next day, which was January 7, to meet with CCO Russell. RP 91, 98-99.

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Peters did not report to the Mason County DOC office or make contact with CCO Russell or CCO Corbett on January 7. Nor did Peters report or make contact on the 8<sup>th</sup>, 9<sup>th</sup>, or 10<sup>th</sup>. RP 99, 101-02. Because Peters had not reported as required, on January 10, 2014, CCO Russell obtained a felony escape warrant for Peters' arrest. RP 91.

Meanwhile, on the evening of January 11, 2014, while still a fugitive, Peters went into the Squaxin Island Tribe's Little Creek Casino in Mason County. RP 59, 64. While in the casino, Peters pushed up against a 70-year-old lady who was playing a slot machine. RP 64, 79, 81-82, 84. As Peters pushed up against the woman, he pulled her cash ticket from the machine, grabbed her purse, and then fled with the cash ticket and purse. RP 80

Squaxin Island Police Officer Tracy Rollins received a report of the incident and responded to the casino within about two minutes. RP 104-06, 113. Video surveillance had captured images of Peters as he ran from the building and went behind the casino. RP 66-67, 106-07. Officer Rollins reviewed the video for about four minutes and then went behind the casino to try to find the purse. RP 106-07, 113.

About five minutes later, as she looked for the purse, Officer Rollins encountered Peters behind the building. RP 108, 113. Peters was holding a ball cap, jacket, and yellow shirt that he had been wearing when the video captured images of him taking the lady's purse and cash ticket. RP 109, 126. Despite the fact that this was a chilly January evening, Peters was now wearing only a pair of jeans and a tight-fitting t-shirt. RP 116, 117. Officer Rollins told Peters to put his hands in the air, but Peters ignored the command. RP 110. When Officer Rollins told Peters for a second time to put his hands in the air, Peters fled instead. RP 110-11.

Officer Rollins and a security chased after Peters. RP 111. They caught up to Peters, captured him, and Officer Rollins placed him under arrest. RP 112. Officer Rollins then contacted the Mason County Sheriff's Office and asked for assistance. RP 112.

Deputy Trout of the Mason County Sheriff's Office arrived and took over the investigation. RP 112, 118-21. Deputy Trout advised Peters of his Miranda rights. RP 121. Peters said that he understood his rights, and he agreed to speak with Deputy Trout. RP 121. Deputy Trout asked Peters to tell him where to find the lady's purse. RP 121-23. Deputy

Trout testified that Peters answered, “quote, if I tell you where it is will you drop all my charges, end quote.” RP 123. Deputy Trout testified that Peters later said, “quote, if I tell you where it’s at then what’s in it for me, end quote.” RP 123. Later, Deputy Trout tried again and asked Peters where he hid the lady’s purse. RP 124. Deputy Trout testified that Peters’ only response was “quote, only if you drop the charges; something has to be in it for me, end quote.” RP 124.

The searchers were not able to recover either the purse or the cash ticket. RP 80-81, 83-84, 114, 130. However, the casino did reimburse the victim for the stolen ticket. RP 80-81, 83-84.

In a two-count, amended information, the State charged Peters with the crimes of escape from community custody and robbery in the second degree. CP 22-23. Before the court submitted the case to the jury for deliberations, Peters requested lesser-included jury instructions for the offenses of theft in the first degree and for theft in the third degree. RP 141-43. The prosecutor commented that “it’s hard for the State to see what the defendant is alleged to have done against the complaining witness in this matter that did not constitute force.” RP 143. But the

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prosecutor conceded that, after doing some research, he agreed with Peters that the lesser-included instructions were appropriate because the issue of whether there was use of force was a factual question for the jury. RP 143. The trial court granted Peters' request and gave the lesser-included instructions to the jury. RP 143-44, 160-62; CP 43-47.

The trial court properly instructed the jury that it must decide each count separately, that its verdict on one count should not control its verdict on any other count, and that it should not improperly infer guilt. RP 157-59; CP 35, 38.

During closing argument, Peters argued that Peters was not the person who stole the purse and cash ticket. RP 183-87. Peters conceded that there was a warrant for his arrest for escape from community custody, and he argued that the reason he ran from police when they confronted him behind the casino was not because he had stolen the purse and cash ticket, but instead, he argued, he ran because he had a warrant for escape from community custody. RP 187.

The jury returned guilty verdicts for the crimes of robbery in the second degree and escape from community custody. RP 200; CP 18-21.

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C. ARGUMENT

The State charged Peters in a two-count complaint with robbery in the second degree and with escape from community custody. Prior to trial, Peters' trial counsel said that the two charges should be severed for trial, but the court did not rule on the issue, and Peters' trial counsel did not renew the motion. *Was Peters' trial counsel ineffective for failing to renew the motion where the decision to forego the severance motion was a legitimate trial strategy and where Peters suffered no prejudice from his counsel's failure to renew the motion?*

Initially, the State charged Peters only with the offense of robbery in the second degree. CP 27. At a pretrial hearing that occurred a couple of weeks before the start of trial, the parties, including Peters' trial counsel, discussed with the court the State's intention to add a holdback charge of escape from community custody. RP 35-36

Defense counsel informed the court as follows: "And I think the escape from community custody would have to be charged as a separate case. I don't think those facts overlap." RP 36. The trial court responded that if counsel wished to seek severance, he needed to bring a motion

expeditiously. RP 36. But the motion was never renewed. Failure to timely renew a motion to sever “before or at the close of all the evidence,” as permitted by Criminal Rule 4.4(a)(2), waives the issue for purposes of appeal. CrR 4.4(a)(2); *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017 (1999).

Peters contends that he was denied effective assistance of counsel because his trial counsel failed to move for severance of his charges. To prevail on a claim of ineffective assistance of counsel, Peters must show that his trial counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and that the deficient performance prejudiced the trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

The reasonableness inquiry presumes effective representation and requires Peters to show the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To show prejudice, Peters must prove that, but for the deficient performance, there is a reasonable probability that the

outcome would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If one of the two prongs of the test is absent, the reviewing court need not inquire further. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). A claim of ineffective assistance of counsel presents a mixed question of fact and law and is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

In the instant case, the State contends that Peter's trial counsel elected as a legitimate trial strategy to forego renewing his motion to sever trial of the escape from community custody charge from trial of the robbery charge. By suggesting pretrial that the two charges should be severed, counsel indicated his knowledge that severance was a possibility that he could pursue. RP 36.

But consideration of counsel's trial strategy and closing argument shows that his failure to renew the severance motion was a deliberate choice. First, the charge of robbery was a much more serious charge than the charge of escape from community custody. Escape from community custody is a class C felony punishable by up to five years in prison (RCW

72.09.310; RCW 9A.20.021(1)(c)), but the robbery in the second degree charge is a class B felony, punishable by up to ten years in prison, and is also a “most serious offense” that could eventually lead to a maximum penalty of life imprisonment. RCW 9.94A.030(32), (37); RCW 9.94A.505, .570; RCW 9A.20.021(1)(b); RCW 9A.56.210. Thus, it would have been greatly to Peters’ advantage to persuade the jury to acquit him of the robbery charge, even it resulted in the jury finding him guilty on the escape charge.

Here, Peters argued during closing argument that he was not the person who stole the purse and cash ticket. RP 183-187. He repeatedly referred to this thief as “John Doe.” *Id.* Peters implied that he was the victim of ambiguous circumstances when police caught him behind the casino holding the clothes that the John Doe robber wore while committing the burglary. RP 186-87. To attempt to persuade the jury that he was not the robber, Peter argued that his reason for running from the police wasn’t because he was the robber, but that, instead, he ran from police because he had a warrant for escape from community custody. RP 187.

If the jury would have been persuaded by Peters' trial counsel's argument, Peters would have avoided conviction of the much more serious of the two charges. And there was very little risk in pursuing the tactic, because the evidence was great for both counts, and the likelihood of conviction even without the benefit of providing an innocent excuse for running from the police. "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *State v. Grier*, 171 Wn. 2d 17, 33, 246 P.3d 1260 (2011).

Additionally, to prevail on a claim of ineffective assistance of counsel claim, Peters must show prejudice. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). And, he must show that, if he had renewed his severance motion and the court granted it, there is a reasonable probability that the outcome of the trial would have been different. *State v. Standifer*, 48 Wn. App. 121, 125-26, 737 P.2d 1308 (1987).

Severance of charges is discretionary. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). A trial court should grant a motion to sever only if the defendant shows that a trial involving the combined

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counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. *Bythrow*, 114 Wn.2d at 718. In determining whether the potential for prejudice requires severance, a trial court must consider (1) the strength of the State's evidence on each count, (2) the clarity of defenses as to each count, (3) court instructions to the jury to consider each count separately, and (4) the admissibility of evidence of the other charges even if not joined for trial. *State v. Russell*, 125 Wn. 2d 24, 62, 882 P.2d 747 (1994). “Even if separate counts would not be cross-admissible in separate proceedings, this does not as a matter of law state sufficient basis for the requisite showing by the defense that undue prejudice would result from a joint trial.” *State v. Markle*, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992), citing *Bythrow*, 114 Wn.2d at 720.

In the instant case, the court properly instructed the jury to consider each count separately. RP 157-59; CP 35, 38. The jury is presumed to follow the trial court’s instructions. *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). And the State produced strong evidence of both counts. *Russell*, 125 Wn.2d at 62.

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There was video evidence that showed Peters during the commission of the crime of robbery. RP 66-67, 106-07. The video evidence showed Peters as he ran to the rear of the casino after the robbery. RP 66-67, 106-07. When a police officer confronted Peters behind the casino, Peters attempted to flee. RP 110-11. When police asked Peters to reveal where he hid the elderly victim's purse, he said he would not tell unless there was something in it for him. RP 123. And, the evidence of guilt of the lesser crime of escape from community custody was equally uncontroverted and overwhelming. RP 89-102.

Because Peters cannot show prejudice, his claim of ineffective assistance of counsel should be denied. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

D. CONCLUSION

Peters' trial counsel openly discussed the issue of severance prior to the start of trial, thus indicating that he was aware of the issue. But counsel did not renew the motion to sever. Instead, counsel allowed the

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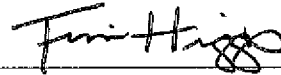
charge of escape from community custody and the charge of robber to be tried together. Then, during closing argument, counsel argued that even though Peters attempted to flee when police approached him after the robbery, Peters did not indicate consciousness of guilt by doing so, because his real reason for running away was because he had a warrant on the escape charge. Thus, Peters' decision to try to the escape charge together with the robbery charge was a tactical decision. The decision was reasonable because the robbery charge carried much more severe consequences than the escape charge, because the robbery charge was a class B felony and a possible persistent offender strike, while the escape charge was a class C felony. The tactic was reasonable because without the tactic the evidence was overwhelming on both charges, but with the tactic Peters had at least some chance that the jury would acquit on the robbery charge.

Finally, even in the absence of a trial strategy explanation, Peters cannot meet his burden of showing that his trial counsel was ineffective, because the evidence was overwhelming on both charges, and Peters cannot show that the court would have granted a severance motion if he

had renewed it and can't show that any prejudice resulted from trying the offenses together.

DATED: March 26, 2015.

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A handwritten signature in black ink, appearing to read "Tim Higgs", written over a horizontal line.

Tim Higgs  
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WSBA #25919

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# MASON COUNTY PROSECUTOR

**March 26, 2015 - 4:20 PM**

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